confidence that, left to its own devices, the market would deliver open access. The NOI refers to this approach as the Commission's "hands-off policy." *NOI* at ¶ 4. Unfortunately, the experience to date with reliance on voluntary negotiations of open access arrangements has been a failure. Indeed there is no credible basis to conclude that, left to their own devices, cable companies owning their own ISPs would be willing to negotiate voluntary, non-discriminatory arrangements with their competitors.

Virtually from the outset of the debate, those hopeful of voluntary solutions, but objective about the results, would have seen the futility of a do-nothing, or to use the Commission's words a "hands-off," approach. Not only is the notion that cable companies would refrain from exploiting their monopoly power counter-intuitive; it is contrary to economic theory and to the policies pursued by the Commission and the antitrust enforcement agencies in similar contexts.

Any company, in the legitimate pursuit of its self-interest, will seek to exploit its control over a scarce resource. This is no criticism of the companies that find themselves in such a position or of the individuals who make decisions for them. To the contrary, a company failing to act in a profit-maximizing fashion would properly invite suspicion from its shareholders, customers and business associates as well as government authorities. It is natural for companies that control access to a connection point between producers and consumers to adopt strategies designed to maximize the profit potential of that control.

Such strategies are readily available when the company in question is also one of the producers. It is clearly not in the interest of such a company to encourage competition at the producer level when it can use its control over access to confer a competitive advantage on its own production operation, or even exclude competing producers altogether. This is why rules designed to promote open access are necessary. As the FERC recently observed:

> It is in the economic self-interest of transmission monopolists, particularly those with high-cost generation assets, to deny transmission or to offer transmission on a basis that is inferior to that which they provide themselves. The inherent characteristics of monopolists make it inevitable that they will act in their own self-interest to the detriment of others by refusing transmission and/or providing inferior transmission to competitors in the bulk power markets to favor their own generation, and it is our duty to eradicate unduly discriminatory practices.

Regional Transmission Organizations, Notice of Proposed Rulemaking, 64 FR 31,390 (June 10, 1999), *FERC Stats. & Regs.* ¶ 32,541 at 33,682 (1999).

Another case in point is the strategy pursued by AT&T prior to the adoption by the FCC and the Antitrust Division of the Department of Justice of policies designed to open the telephone network to competing component providers. A key element of that policy shift was the requirement that AT&T unbundle the purchase of telephone equipment from its local telephone service and make its local telephone lines available on non-discriminatory terms to competing equipment providers. AT&T fiercely resisted those policies from their inception, seeking to protect what has been termed its "legacy" business mode based on a market structure under its control.[41] An array of telecommunication equipment alternatives developed thereafter.

In addition to policy experience, economic theory and common sense, actual experience in the cable industry demonstrates that vertically integrated cable system operators are unlikely to afford reasonable access to providers of competing services. Consider, for example, AT&T's highly publicized non-binding offer last year to negotiate open access arrangements with ISP Mindspring in Atlanta and its promise to negotiate later—*i.e.*, after expiration of its exclusive dealing arrangement with its ISP affiliate—with competing ISPs. Within days of AT&T's announcement, the offer was denounced by Mindspring itself as inadequate. Among other things, said Mindspring, there was too long a delay and no ability to use full streaming video

[41] *See* Lemley & Lessig submission in AT&T/Media One proceeding ¶¶ 37-43.

capabilities. *Attachment* 5. See also, Vermont Telecommunications Plan, 2000 (August 2000) at 3-43. Others whom the Commission had brought into discussions with AT&T were similarly disappointed. As Media Access Project President Andrew Schwartzmann wrote in a letter to the Chairman on December 6, 1999:

> Several months ago, you asked me to meet with representatives of AT&T, Excite@Home, MindSpring, Atlanta Mayor Campbell and the FCC's Local and State Government Advisory Committee to with the goal of reaching agreement on a definition of "open access" in the cable broadband environment. I am among the three of these six people you called upon who have chosen not to sign the letter being sent to you today.
>
> In dozens of hours of conversation over the last four months, I tried to work constructively towards that objective. So did the others. The discussions were candid and sincere. I believe the participants acted in good faith at all times.
>
> ***It is with regret that I advise you that what AT&T describes in the letter being sent to you today by three of the six members of the group IS NOT "Open Access."***
>
> ****
>
> **1. Although AT&T owns 58% voting control of Excite@Home, it is hiding behind an "exclusive contract" to delay introduction of broader access for up to two and a half years, and perhaps much longer.**
>
> ****
>
> To call this open access is like saying that on January 1, 1984, the day AT&T divested the local phone companies, there was competition in long distance services. The Commission should not allow a new monopoly to be created as it "watchfully" waits for competition.
>
> **2. Open access requires more than a choice of ISP's.**
>
> Open access requires that cable operators provide competing ISP's with full access to their systems under the same terms and conditions, and at the same rates, that access is available to affiliated ISP's. An operator should not be able to restrict offerings to those which its affiliate chooses to provide.
>
> **3. Requiring ISP's to use AT&T transport facilities permits content-based discrimination in favor of preferred content providers and commercial partners, and threatens to undermine the most valuable characteristics of the**

Internet: low entry barriers for nascent entrepreneurs, free expression and serendipitous innovation.

Throughout the discussions I attended, AT&T was unwilling to agree to let ISP's have access to connections at the cable head end. It instead insisted that ISP's use AT&T transport facilities all the way to the Internet backbone. The absence of an affirmative statement that ISP's cab connect at the head end is profoundly anti-competitive, and utterly at odds with what the Commission expects of all other telecommunications services. It particularly penalizes ISP's which own, or have long-term leases for, transport facilities, and which may have built their own regional nodes.

****

Free expression includes the right not to receive access to unwanted material. Your strong support for the television v-chip ought to impel you to examine how closed access does not permit parents to use effective "server side" filtering by subscribing to "family friendly" ISP's. This problem is discussed in the brief Media Access Project co-authored in the Ninth Circuit Portland case: http://www.mediaaccess.org/filings/index.html#anchor44776

4. AT&T has abandoned its claims that it is not technologically feasible for cable operators to provide access to multiple ISP's.

Even as technologists at the highest levels of AT&T and Excite@Home were representing to me that there is no technological impediment to providing citizens with access to multiple ISP's, their lobbyists have continued to argue the contrary position before numerous state and local legislative and regulatory bodies. Indeed, a significant factor in my decision to withdraw from the talks you asked me to attend was the claim contained in an October 15, 1999 article by Excite@Home's General Counsel that "The technology simply does not yet exist to allow multiple ISPs to share a coaxial cable on a commercial basis."[42]

****

5. Open Access brings a better financial return for cable operators.

Competitive ISP's will generate more revenue for cable operators. They can market to, and provide better customer service for, citizens who might otherwise be left on the wrong side of the digital divide. For example, Cuban-Americans have different needs than Mexican-Americans and citizens of Puerto Rico. Cultural impediments may mean that a single ISP with one Spanish language

[42] Daniel Pine, *Let the Feds Regulate*, at http://www.thestandard.com/article/ display/0,1151,7017,00.html A forceful rebuttal can be found in a two part article, Professor Lawrence Lessig, *Cable Blackmail*, at http://www.thestandard.com/article/0,1153,5198,00.html and *The Cable Debate, Part II*, at http://www.thestandard.com/article/0,1151,5621,00.html

marketing staff may plan will miss many of these new customers, leaving others outside the digital environment.

****

6. AT&T has been unwilling to make a written commitment that customers can purchase Internet access at commercially reasonable rates without having to buy a bundled "package."

Failure to permit independent purchase of Internet services threatens to expand the digital divide.

Attachment 6.

Not only were there obvious deficiencies in the AT&T promises outlined in Mr. Schwartzmann's letter, but the ink had barely dried on AT&T's offer when, on December 14, 1999, its cable chief, Daniel Somers, made clear that, whatever limited access AT&T might offer to competing ISPs, they would not be able to use AT&T cable lines to transmit streaming video over the Internet. Vermont Governor Dean detailed in a December 17, 1999 letter to Chairman Kennard both the problem with AT&T's watered down version of access and the fact that other cable companies weren't offering access to competitors at all:

> I, as others, have read of, and commend your efforts to encourage cable companies to open their systems to ISPs voluntarily. I also applaud your success in encouraging AT&T to commit -- albeit on a non-binding and limited basis -- to open its system sometime in the next few years. Even this limited change in AT&T's policy couldn't have taken place without the implicit threat of regulation that your efforts represented.
>
> Reliance on the voluntary cooperation of cable companies, however, even under the threat of regulation, simply isn't enough. For one thing, AT&T's promise is of no benefit to Vermont, where 90 percent of cable subscribers rely on Adelphia, a company that remains adamantly opposed to providing ISPs access to its system. As important, even AT&T has made clear that its voluntary commitments do not include allowing ISPs to offer video programming that would compete with its cable business. *Attachment* 7.

Attachment 18.

The next month, in January, 2000, open access lost another battle. One of its leading proponents, AOL, announced its merger with Time Warner and, on February 29, 2000 issued a non-binding, non-enforceable Memorandum of Understanding with Time Warner committing to non-discriminatory access for unaffiliated ISPs, a commitment that, it turns out, is very short on substance.

Press reports about Time Warner suggest that, like AT&T, Time Warner has little desire, and no willingness absent compulsion, to negotiate meaningful open access arrangements anytime soon. Like AT&T, and the cable industry generally, Time Warner has previously expressed opposition to open access on the grounds that its "negotiated" arrangements with affiliated ISPs pose a contractual bar, that open access is technically infeasible and that it will discourage investment in cable infrastructure. See, e.g., comments of Time Warner, Adelphia, Comcast, National Cable Television Association in Internet Ventures, Inc. Case Identifier No. CSR-5407-L. And, like AT&T, its willingness even to discuss such arrangements coincided with its need to obtain government approval of a major merger (in AT&T's case the merger with Media One and in Time Warner's case, the merger with AOL). Thus, Time Warner now expresses a willingness to negotiate voluntary access arrangements with unaffiliated ISPs, albeit in the form of non-binding assurances. Press reports indicate that the FTC has regarded those assurances as insufficient, insisting on a *binding* open access commitment from Time Warner. *See Attachment* 8. Even Time Warner's limited undertaking, however, should be viewed with skepticism. It is well-settled proposition of antitrust law, applicable here, that management decisions made under the pressure of a government antitrust suit should not be given much weight. *See, e.g., U.S. v. Continental Can Co.*, 378 U.S. 441, 463 (1964); *FTC v. Consolidated Foods Corp.*, 380 U.S. 592, 598 (1965); *FTC v. Proctor & Gamble Co.*, 386 U.S. 568, 576 (1967). Concern about undue reliance on such evidence is especially warranted where the conduct was, as here, subject to the control of the merging parties. *United States v. General Dynamics Corp.*, 415 U.S. 486, 504-05 (1974).

Serious questions, moreover, have been raised about the bona fides of Time Warner's voluntary commitment. According to an October 7, 2000 account in the Washington Post, while "Time Warner Inc. has offered nearly 40 Internet service providers in Texas access to its cable television lines," it has done so "only under conditions that would give the New York media giant a huge piece of their revenue and control over crucial content." "Time Warner Terms For Cable Criticized," October 7, 2000 Page E01. Under a previously confidential[43] term sheet provided to some ISPs and attached as Appendix 9, Time Warner would receive 75 percent of the Internet service providers' revenue from all subscriber fees—which are often their biggest source of sales. Time Warner also would get 25 percent of the Internet service providers' revenue from other sources--such as advertising and other e-commerce fees—even though they are financial transactions not directly related to Time Warner's cable business." *Id.* Time Warner would receive $50,000 as an upfront deposit and would get approval control over the Internet service providers' home pages and 'prominent above-the-fold areas on the home page of the service for use.' *Id.* Like AT&T, Time Warner would make it difficult for ISPs to compete in the provision of television-type programming. Moreover, if the Internet service providers offer telephone service over the Internet or video streaming, Time Warner would not be

[43] Time Warner's insistence on confidentiality with respect to its term sheets is itself quite troublesome. As the Commission recently noted in *In the Matter of BellSouth Corp.*, FCC 00-389 (November 2, 2000), under Section 51.301(c)(1) of its regulations "a telecommunications carrier violates the duty to negotiate in good faith by "[d]emanding that another party sign a nondisclosure agreement that precludes such party from providing information requested by the Commission, or a state commission or in support of a request for arbitration under Section 252 (b)(2)(B) of the Act." *Id.* at ¶ 4. Overly broad non-disclosure agreements, the Commission added, "may well have anticompetitive effects." *Id.*

obligated to "provide [quality of service] support," according to the term sheet. That means that Time Warner would not be responsible should the service not respond fast or clearly enough. *Id.*

As detailed in the Micronomics report, the conditions contained in the term sheet are anticompetitive. *Attachment* 10.

The practices of AT&T/TCI provide similar cause for concern. Before its merger with AT&T, TCI offered to allow consumers to purchase third party ISP service, provided that the consumer agrees to continue purchasing the cable company's ISP service as well. This is a classic form of anticompetitive conduct. *See, e.g., Cajun Electric Power Cooperative, Inc. v. FERC*, 28 F.3d 173, 177-79 (D.C. Cir. 1994) (utility practice requiring its transmission customer desiring to purchase power from third party to continue paying for utility's now-unused generating capacity as well was form of tie-in agreement)[44]. There is no reason to believe that, absent regulatory compulsion, TCI or other cable companies will not continue such tactics[45].

That constraints on cable companies are necessary to protect the public interest is demonstrated by the numerous instances of anti-competitive behavior by cable companies and their ISP affiliates and the efforts to combat those practices being carried out by local franchising authorities and in the courts. The most recent such example of this is a class action lawsuit filed

---

44 Tie-ins, it bears noting, can be anticompetitive even where the party imposing the tie does not possess full-blown monopoly power, but nonetheless has the "special ability ... to force a purchaser to do something that he would not do in a competitive market," *Jefferson Parish Hospital Dist. No. 2 v. Hyde*, 466 U.S. 2, 13-14 (1984). *See* also, *United States Steel Corp. v. Fortner Enterprises, Inc.*, 394 U.S. 495, 504 (1969) (market power for purposes of tie in analysis is the economic power to impose the tie "with respect to an appreciable number of buyers within the market.") In rural communities, in particular, customers desiring high speed Internet service would have little choice but to purchase the service from the cable company's affiliate.

45 A November 23, 2000 article in the Washington Post underscores this concern. The article, "AT&T Puts Open Access to the Test," Section E, p.1, describes an AT&T test of limited "open access" under which 500 residents of Boulder, Colorado are "receiving free service and a choice among eight Internet service providers (ISPs)." Although given access to several ISPs, customers are unable to avoid the AT&T logo on their screens. More troublesome is the fact that AT&T has designed its access system to ensure that when customers "click on the 'Internet' window" (*Id.* at E15), they will be directed to AT&T's own browser. This, as the article notes, has raised concerns among ISPs that AT&T will use its browser to steer traffic to favored sites or make access to such sites faster. *Id.*

last year in the United States District Court, Central District of California, Western Division naming, as defendants, virtually every cable multi-system operator in the nation, including Time Warner and MediaOne Group ("MediaOne').[46] The suit also names as defendants ServiceCo L.L.C. (d/b/a RoadRunner) ("RoadRunner"), an ISP in which Time Warner and MediaOne hold interests, and At Home Corporation ("@Home"), another ISP in which the remaining MSO defendants hold interests.

The Complaint, filed by four customers of the Internet services provided by the defendants, notes that, pursuant to contracts between each MSO and its affiliated ISP, the MSO requires its subscribers who wish to purchase broadband Internet data transmission service from it to also purchase the Internet interface/consent service provided by its affiliated ISP (i.e., @Home or RoadRunner). These agreements compel a customer who desires service from an ISP not affiliated with the MSO-related ISP "to pay a supercompetitive price for Internet interface/content services and/or to purchase redundant Internet interface/content services sold by the [MSO's ISP affiliate] that he or she would not otherwise have purchased." Particularly in light of the technical superiority of cable broadband Internet transmission service to the narrowband service offered over standard telephone lines and the superior access into homes enjoyed by the cable systems, the Complaint observes that cable is dominant in the marketplace and that this state of affairs has harmed competition, in violation of various provisions of the

[46] The suit also names, as defendants, the following MSOs: AT&T, MediaOne Group, Tele-Communications, Inc., Cox Communications, Inc., Comcast Corporation, Jones Intercable, Inc., Cablevision Systems Corp., Arahova Communications, Inc. and Garden State Cable Vision LP. A copy of the Complaint is provided as *Attachment* 11 hereto.

Sherman Act, the Cartwright Act and California law. See attached complaint, *Attachment* 11. A similar complaint was filed in Pittsburgh, Pennsylvania by GTE.[47]

It bears emphasis that while the cases cited above, as well as the refusals to deal recounted in the attached affidavits of several ISPs constitute only evidence of complaints and not findings of wrongdoing by the cable companies, they are nonetheless relevant to the Commission's assessment of the state of the industry and the need for regulatory action. FERC's observations in its recently issued *Order No.* 2000, FERC Stats & Regs. ¶ 31,089 (1999) address this point directly:

> [T]he Commission considers allegations of discrimination, even if not reduced to formal findings, to be a serious concern for two reasons. First, this can be indicative of additional, unreported, discriminatory actions, because there are significant disincentives to filing and pursuing formal complaints that would result in definitive findings.[48] The NOPR expressed a concern that actual problems with functional unbundling may be more pervasive than formally adjudicated complaints would suggest. Second, the NOPR explained that allegations of discrimination are serious because, if nothing else, they represent a perception by market participants that the market is not working fairly. If market participants perceive that other participants have an unfair advantage through their ownership or control of transmission facilities, it can inhibit their willingness to participate in the market, thus thwarting the development of robust competition.

FERC Order No. 2000, supra at 31,005.

The types of limitations on ISPs discussed earlier could not be imposed or maintained if the cable companies did not possess market power over transmission for ISPs and they underscore the need for regulatory intervention to protect competition as discussed in the

---

[47] *See GTE Internetworking, Inc. v. Telecommunications, Inc., et al.*, No. 99-1737 (D.Ct. WDPa., docketed October 25, 1999).

[48] As noted in the NOPR, transmission customers are reluctant to make even informal complaints because they fear retribution by their transmission supplier; the complaint process is costly and time-consuming; the Commission's remedies for violations do not impose sufficient financial consequences on the transmission provider to act as a significant deterrent; and, in the fast-paced business of power marketing, there may be no adequate remedy for the lost short-term sales opportunities in after-the-fact enforcement. See FERC Stats. & Regs. ¶ 31,089 at 31,005.

attached Microeconomics Report. *Attachment* 10. Indeed, the notion that the cable companies do not possess market power over ISPs cannot be squared either with the Communications Act or the Commission's interpretations thereunder.

Consider, for example, the leased access provisions of the Act. The purpose of the leased access provisions is set forth in the statute itself: "to promote competition in the delivery of diverse sources of video programming *and* to ensure that widest possible diversity of information sources are made available to the public from cable systems in a manner consistent with growth and development of cable systems." 47 U.S.C. §532(a) (emphasis added) The statutory provisions of the Cable Communications Policy Act of 1984 ("1984 Cable Act") governing leased access were amended in 1992 due to legislators' "concern that some cable operators may have established unreasonable terms or may have had financial incentives to refuse to lease channel capacity to potential leased access users based on anti-competitive motives, especially if the operator had a financial interest in the programming services it carried."[49] This concern, however, was part of the 1984 Cable Act as well, since Congress recognized then, too, that promoting diversity and preventing the exercise of market power by cable operators could not be separated. *See Media Ranch, Inc. v. Manhattan Cable Television, Inc.*, 757 F. Supp. 310, 315 (S.D.N.Y. 1991).

While the Commission has concluded that Internet Service is not "video programming" within the meaning of Section 612 of the Act, *Internet Ventures, Inc.*, "Memorandum Opinion and Order," File No. CSR-5407-L (Feb. 18, 2000), it has also acknowledged that it would face a different case if an ISP "proposed to utilize leased access capacity for the provision of a service comprised wholly of video programming available via the Internet." *Id.* at 8. The cable companies, have, in fact, been developing such Internet-based programming projects. *See Vermont Telecommunications Plan 2000 (August 2000), www.state.vt.us/psd/te100.htm, supra* at 3-45.[50] As noted, the statute already assumes that cable companies have market power over the transmission of video programming using cable lines. There is no logical reason, therefore, much less a statutory one, to conclude that cable would somehow lose this market power if the same lines were used to transmit Internet-based video programming rather than other, more traditional "video programming." To be sure, the Commission has held that when Internet-based video programming is coupled with other Internet services the resulting service is not "video programming" for purposes of leased access. It does not follow, however, that cable market power over unaffiliated video programmers would be altered solely because the video programming came coupled with email or web hosting offered by an ISP. On the contrary, the cable companies' ability to offer all of these services through their affiliated ISPs gives them added, not reduced, leverage over competitors.

B. Caching and Content Limits Are Evidence of Cable Company Market Power.

In addition to retarding the development of Internet-based video programming, the Commission's "hands-off" policy will continue to permit cable companies to control content and advertisers through caching practices and the imposition of other restrictions:

> Even with open access arrangements in place, the cable company has control over the transmission of packetized data between its head end CMTS and the end user subscribers. Concerns remain over the potential for preferential treatment of data from affiliated providers. For example, a cable company with a co-marketing

[49] Cable Television Fact Sheet, Federal Communications Commission at 13-14 (August 1997)).

[50] The Vermont Telecommunications Plan 2000 discusses NBC's development of "Intertainer," a "new service that allows users with cable modems to order movies.. using a Web-like clickable interface." "Comcast, Sony, Intel and NBC," the report continues, "are all strategic partners in Intertainer. It is not a Web site channel, but a video on demand service delivered from a video server, received by cable customers on their PCs by using cable modems." *Id.* at 3-45.

> arrangement with one bookstore could use the capabilities inherent in its Cisco Internetworking software to prioritize packets from its affiliated bookstore, sending them downstream to the end users at full speed. Unaffiliated competitors' traffic, from other on-line book stores, for example, can be given lower priority and much slower transmission. As e-commerce sites increasingly utilize video streaming to present their products, sites relegated to the slow lane will be cumbersome if not impossible to use, compared to the more robust video transmissions of affiliated traffic assigned to higher priority fast lanes. For this reason, it is critical to establish requirements that ensure nondiscriminatory treatment of traffic.

Vermont Telecommunications Plan, *supra* at 3-44-45.

The NOI asks whether the current pledges by cable operators for future open access are specific enough to guarantee open access once they are implemented. *NOI* ¶ 39. The answer to this question is an emphatic "no." Just as the Commission has concluded that, in the absence of national, uniform and enforceable standards, ILECs "will continue to delay unreasonably" in providing non-discriminatory access to CLECs, *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 98-147 et al., Order on Reconsideration and Second Further Notice of Proposed Rulemaking in CC Docket No. 98-147 and Fifth Further Notice of Proposed Rulemaking in CC Docket No. 96-98 (Aug. 10, 2000), ¶ 22. (Collocation Order), so too does the absence of mandatory open access rules give cable companies license to frustrate and delay access to ISPs that compete with cable affiliates. Like ILECs, cable companies "have the incentive and capability to impede competition" through dilatory tactics. *See* Order on Reconsideration, ¶ 50. That is why firm rules, not voluntary negotiating guidelines, are needed. Again, the FERC's experience with open access to electric transmission systems is directly relevant:

> [T]ariffs are essential to the provision of comparable services. Tariffs set out the services that are available and the terms and conditions under which those services will be made available....[In contrast], a negotiation process creates uncertainty and imposes on customers delay and other transaction costs that the transmitting utility members of an RTG do not incur when using the transmission for their own benefit. Moreover, the ability to execute separate transmission

agreements with different but similarly situated customers is the ability to unduly discriminate among them. A tariff ensures against such discrimination in the RTG regional transmission group.

Southwest Regional Transmission Association, 69 FERC ¶ 61,100 at 61,398 1994)

While we can appreciate the Commission's expressed desire to minimize regulation of the Internet, to leave the *status quo* would constitute tacit approval of cable industry leveraging practices; i.e., the cable companies' use of their substantial market power in high speed transmission to secure customers for the Internet services offered by their affiliated ISPs. Cable companies such as AT&T have directly conceded the feasibility of providing access to multiple ISPs by indicating an intent to sign them up. By so indicating, cable providers also implicitly concede that providing access to their competitors will not discourage the deployment of broadband services. Allowing the cable industry to delay granting access for several years—the remaining term of the @Home exclusivity arrangements—will only serve to provide their ISP affiliates an unfair head start and a chance to entrench themselves in the market on a basis other than the merits of their service offerings.[51] Open access utilizing the leased access pricing model, on the other hand, would provide the Commission with an already established set of rules by which to mandate broadband cable access over cable channels and promote competition. The latter result is clearly in the public interest.

III. An Open Access Requirement Is In The Public Interest, Is Readily Implemented, and Is Consistent With Other Regulatory Policies. (NOI ¶¶ 25-31, 43-53)

Both this Commission and other regulatory agencies have long recognized that the companies they regulate can exert market power through exaction of onerous terms, as well as through unreasonably high prices. Indeed, where the regulated entity competes with its customers, regulators have found it is essential to be vigilant about exclusionary practices. This Commission's co-location rules are a prime example of agency regulation designed to limit the exercise of market power through the imposition of onerous terms and conditions of access. See, Collocation Order, supra.

If one were simply talking about a regulated conduit, regulation of rate levels might well provide the basic consumer protection needed against abuse of market power. Where, however, the conduit is also in the business of providing competitive goods or services that utilize the conduit facilities, terms and conditions take on added importance. The co-location regulations adopted by the Commission, for example, simply reflect the reality that ILECs not only have "last mile" market power, but utilize that "last mile" to provide advanced telecommunications services in competition with other entities that are reliant on those same facilities. The same phenomenon can be observed in other conduit or network industries. Thus, oil and gas pipelines have inherent incentives to favor their subsidiaries involved in the sale of oil and gas respectively.[52]

In *American Electric Power Service Corp.*, 67 FERC ¶ 61,168 (1994), the Federal Energy Regulatory Commission approached the same problem. In defining just and reasonable, not unduly discriminatory access, the overarching principle it adopted was a simple but powerful one. FERC announced that it would employ a "golden rule" to govern transmission access.

---

[51] *See, e.g.*, Francois Bar, Stephen Cohen, Peter Cowhey, Brad DeLong, Michael Kleeman, John Zysman, "Defending the Internet Revolution in the Broadband Era: When Doing Nothing is Doing Harm" (Economy Working Paper 12 August 1999) at 16.

[52] *See FERC Order No. 497 FERC Stats. & Regs.* ¶ 30,820 at 31,129 (1988). Similarly, electric utilities owning transmission facilities and left to their own devices, historically refuse to provide access to companies competing with them in the sale of power or offered to do so only on terms and conditions that were onerous. *See FERC Order No.* 888, *"Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities," FERC Stats. & Regs.* ¶ 30,036 at 31,646 (1996); *aff'd in relevant part, Transmission Policy Access Study Group v. FERC*, 225 F. 3d 667 (D.C. Cir. 2000).

Transmitting utilities would be required to provide service on terms and conditions and at rates no less favorable than they provided to themselves or their affiliates for the carriage of power. *Id.* That principle continues to underpin FERC regulation of electric transmission access.[53] Just as Congress concluded when it passed the 1996 Telecommunications Act, however, FERC concluded that additional steps were necessary to ensure nondiscriminatory access. Thus, it first ordered that all electric utilities file pro forma tariffs adopting standard terms and conditions of access as well as pricing methodologies. *Order No.* 888 at 31,734. It later concluded that those steps were inadequate and that unless more aggressive steps were taken to divorce transmission and power supply ownership, transmission providers would continue to favor the sale of their own energy products. *FERC Order No.* 2000, *FERC Stats. & Regs.* ¶ 31,089 at 31,015-17 (1999). The specific steps that FERC has chosen are, of course, peculiar to the industry it regulates. It is sufficient here to emphasize that the basic "golden rule" adopted by FERC is an equally useful construct to apply to cable access.

In its recently filed White Paper, NorthNet, a Wisconsin ISP, makes essentially this point. It suggests that, in the absence of a court proceeding, "the maximum rate for ISP use of 6 MHz of spectrum should be set at the maximum implicit price paid by any entity for leased access to 6 MHz of spectrum for the delivery of cable programming." NorthNet White Paper at 13. This suggestion is well grounded in the statute and the Commission's regulations, as well as the record amassed by the Commission in *Internet Ventures, Inc.*, File No. CSR-5407-L (February 18, 2000). There, Internet Ventures and the Vermont Department of Public Service both

[53] *FERC Order No.* 888, "Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities," *FERC Stats. & Regs.* ¶ 30,036 *(passim)* (1996).; *aff'd in relevant part, Transmission Policy Access Study Group v. FERC*, 225 F. 3d 667 (D.C. Cir. 2000).

maintained that Internet service providers offered video programming and hence were eligible for leased access under section 612 of the statute. They also provided evidence, unrefuted by other participants, that multiple ISPs could be accommodated on a single cable channel.[54] While the Commission held that the leased access provisions of the Act do not apply to ISPs, they are nonetheless helpful in defining non-discriminatory, just and reasonable rates, terms and conditions of service.

More specifically, although the Commission ultimately rejected the argument that ISPs provide "video programming" within the meaning of section 612, it recognized that video programming might well be delivered over the Internet and that, if an entity were engaged solely in the provision of video programming that was Internet-based, a different question would have been presented. *Internet Ventures, Inc.*, File No. 5407-L (February 18, 2000) ¶ 13. The upshot of that statement is that Internet-based video programming would be entitled to access to cable facilities under the implicit pricing standard established by the Commission's regulations governing leased access. In this regard it bears noting that cable operators characteristically set up their operations so that their affiliate's Internet service is available over one of the programming channels, "Internet Over Cable," FCC Staff Report at 80.

A. The Commission Has the Power to Abrogate The Exclusive Dealing Provisions of the Agreements Between the Major Cable Companies and Their Affiliates.

Among the obstacles to open access posed by the major cable companies is the alleged impediment posed by their exclusive dealing arrangements with their ISP affiliates, agreements that would lock competitors out of the market for periods of an additional year or more. These

[54] *See* attached Affidavit of Frederick Enns, *Attachment* 13.

contractual provisions should be declared unjust and unreasonable and invalidated. The Commission has the plain authority to do so.

Modification of unjust and unreasonable contract terms is wholly within the Commission's powers. *Puerto Rico Telephone Co.*, 92 FCC2d 274 ¶ 36 (1983) (striking down exclusive dealing arrangement in contract); *MCI v FCC*, 665 F.2d 1300 (D.C. Cir. 1981); *In The Matter Of Promotion Of Competitive Networks In Local Telecommunications Markets,* CC Docket No. 96-98, 2000 WL 1593327 (Oct. 25, 2000), ¶¶ 25-27; 163-64. Such relief is needed, moreover, where, as here, the exclusive dealing provisions are tainted by the monopoly power of the cable companies. *See, e.g., Associated Gas Distributors v. FERC*, 824 F.2d 981, 1017 (D.C. Cir. 1987) (interpreting comparable provisions of the Natural Gas Act to modify contracts that were the product of the pipelines' monopoly power.) As AT&T has stated, not only does the Commission have the power to void exclusive dealing provisions in contracts currently in effect (*Promotion Of Competitive Networks In Local Telecommunications Markets, supra* at ¶ 35), they perpetuate barriers to entry. *Id.* AT&T's comments in that case were particularly apt:

> AT&T has argued that for local competition to thrive among telecommunications carriers in commercial MTEs, building owners must be permitted to terminate their existing exclusive contracts and seek new relationships with competing carriers. Moreover, AT&T argues that the Commission has authority to void exclusive contracts that are currently in effect.

Promotion Of Competitive Networks In Local Telecommunications Markets, supra at ¶ 163.

B. Cable Open Access Will Create Competitive Pressure Between Cable and Other High-Speed Service Providers in Markets Where Cable Modem Service Faces Competition.

The Competitive Access Coalition urges the Commission to adopt a non-discrimination model that is cost-based and assures unaffiliated ISPs of access at prices, terms and conditions comparable to those the cable company offers to its affiliates.

In those limited areas where consumers have a choice between DSL and cable platforms to provide high-speed access to Internet service in the Washington metropolitan area, companies like Comcast have offered cable modem service at $39 per month, a price cable companies have touted as "competitive" with DSL service. Yet, as demonstrated elsewhere in these comments, a nonaffiliated ISP needs no more than a single cable channel to provide service to customers. Indeed, multiple ISPs can share the same channels since no customer is likely to purchase ISP service from more than one provider.

It is difficult to imagine that a cost-based access charge for cable modem service could be more than the cost of purchasing a premium channel of video programming from the cable operator—a price typically in the range of $10 or so. Even premium ISP service with its own proprietary content, from a provider like AOL or MSN, costs no more than $22 a month. If cable companies offered access to ISPs at $10 a month per ISP subscriber, the likelihood is that this would put downward pressure on DSL prices, since the cable modem service price would set the ceiling on a competitive price from DSL providers.

Thus, one benefit of a cost based open access model is that it would likely reduce the price for high-speed Internet access for those customers who do have limited competitive alternatives. Of course, as we have emphasized elsewhere in these comments, many consumers around the country, particularly in rural and low income urban areas, only have the cable modem alternative. However, to the extent that cable modem service provides competition to other providers of high-speed access, a cost-based open access platform can only serve to help consumers by driving down the prices that high-speed competitors provide for access to their networks.

The model we suggest would include identical operations support systems interfaces for affiliated and unaffiliated ISPs. While interfaces may change with developments in technology, the surest way to enforce non-discriminatory access is to require that affiliated and unaffiliated ISPs receive the same functional access:

> The implementation of router-based technology known as policy-based routing would enable access by multiple service providers to the cable operators' high speed data networks. This would enable users to select their Internet service provider of choice, and have that provider's service transmitted over the designated Internet channel, somewhat akin to presubscription of a telephone number to a long distance telephone service provider. See the Canadian Cable Television Association's submission to the CRTC (the Canadian FCC) in response to Telecom Public Notice 98-9, the "Technical Report on Alternative Methods of Providing Access for Internet Service Providers," August 24, 1998.

Vermont Telecommunications Plan 2000 (August 2000), www.state.vt.us/psd/te100.htm, supra at 3-44 n. 302.

IV. Commission Forbearance Is Inappropriate (NOI ¶¶ 32-42, 53-56).

A. The Commission May Not Forbear By Inaction

The Ninth Circuit in *City of Portland* recognized that "the FCC has broad authority [under 47 U.S.C. §160(a)] to forbear from enforcing the telecommunications provisions if it determines that such action is unnecessary to prevent discrimination and protect consumers, and is consistent with the public interest," and left the Commission free to make such a determination in that case. 216 F.3d at 879-80. As the court observed, however, the statute requires that the Commission make the specified determinations as a predicate for forbearance; it may not simply fail to act.

In short, forbearance by inaction—what the Commission has referred to as its "hands-off policy"—is no longer an option. The Commission participated in *City of Portland*, and the Ninth Circuit's holding that cable access to ISPs is a telecommunications service is binding. "Once we have determined a statute's meaning, we adhere to our ruling under the doctrine of stare decisis, and we assess an agency's later interpretation of the statute against that settled law." *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 131 (1990). *See also*, *Bankers Trust New York Corp. v. United States*, 2000 WL 1346141 at 7 (Fed. Cir. 2000) ("[T]he Court's interpretation of a statutory provision trumps a subsequent agency interpretation that is inconsistent with the Court's precedent. The Supreme Court's reasons for adhering to its prior decisions in this context reflect the relationship of the Judiciary to Congress and the ability of Congress to change its statutes to correct a misinterpretation by the Court. These reasons would seem to apply equally to decision rendered by circuit courts of appeal").

Because cable access to ISPs is a telecommunications service, it is subject to the provisions of the Telecommunications Act of 1996 which, as the Ninth Circuit observed, "enacted a competitive principle embodied by the dual duties of nondiscrimination and interconnection." *City of Portland*, 216 F.3d at 879 (citing 47 U.S.C. §§201(a) and 251(a)(1)). *See also* 47 U.S.C. §153(43) ("A telecommunications carrier shall be treated as a common carrier . . . to the extent that it is engaged in providing telecommunications services").

The Commission cannot forbear from regulating the cable modem service or the cable platform in the present instance. Section 160(a) of the Act permits the Commission to forbear from regulating a telecommunications service only if the Commission makes an affirmative determination meeting the following criteria:

> (1) Enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory;
>
> (2) Enforcement of such regulation or provision is not necessary for the protection of the consumers; and
>
> (3) Forbearance from applying such provision or regulation is consistent with the public interest.

47 U.S.C. §160(a).

Finally, in determining whether forbearance from enforcing regulation is consistent with the public interest, the Commission must consider whether such forbearance "will promote competitive market conditions, including the extent to which such forbearance will enhance competition among providers of telecommunications services." 47 U.S.C. §160(b). All of this must be done through the affirmative exercise of the Commission's powers, articulated in a written order. *See also* 47 U.S.C. §154(j) ("Every . . . official act of the Commission shall be entered of record").

B. There Is No Basis For a Commission Determination That Forbearance Is Appropriate

In the case of ISP access to broadband cable services, there is no evidence to support any of the determinations necessary for a decision to forbear, much less all three of them as the statute requires. To the contrary, economic theory, sound public policy, experience and common sense all counsel strongly in favor of imposing the common carrier duties of nondiscrimination and interconnection on cable systems insofar as Internet broadband services are concerned. A requirement of open access, like that imposed on other telecommunications services, is very much in the interest of promoting competition, protecting consumers and advancing the public interest.

Forbearance would be inconsistent with the Commission's policy of maintaining technological neutrality. Currently, in wireline telephony, the Commission regulates incumbent LECs by requiring that those carriers allow nondiscriminatory access to unaffiliated ISPs and allow interconnecting competitive local exchange carriers (CLECs) to provide DSL service. There cannot be a rationale for forbearance from regulating a telecommunications service in cable when DSL access is so regulated. Nor can the Commission achieve competitive neutrality by forbearing from regulating either cable or telephone wires, having very recently decided (in August 2000) to strengthen regulation of telephone wires because it found that DSL providers were not getting reasonable access.

Forbearance would also violate the statutory requirement that charges, practices and classifications in connection with the provision of telecommunications service are "just and reasonable and are not unjustly or unreasonably discriminatory." 47 U.S.C. §160(a)(1). Ample evidence is provided in these comments that, absent Commission action, a great potential exists for cable operators to engage in discriminatory practices with regard to providing ISPs with access to the cable platform. Similarly, it will be demonstrated that consumers, particularly rural and low-income consumers, will suffer the effects of discriminatory practices in the form of higher prices or lack of access to high speed services. *See* 47 U.S.C. §160(a)(2). Forbearance would ignore these adverse results, while preventing state utility commissions from addressing such issues on a local or regional basis.

Nor would forbearance "promote competitive markets" and "enhance competition among providers of telecommunications" services as required by 47 U.S.C. §160(b). To the contrary, there is every reason to believe, and abundant evidence to demonstrate, that cable system operators have both the power and the incentive to foreclose innovative uses of broadband Internet technology, such as Internet-based video programming and video conferencing.

Finally, there is nothing on the competitive horizon to suggest that forbearance is appropriate. Competitive alternatives to cable for high-speed Internet access are few and limited, and the likelihood that open access will evolve as a result of market forces is small.

1. Forbearance Would Violate the Commission's Policy of Competitive Neutrality.

The NOI asks whether the Commission should attempt to achieve competitive neutrality by imposing the same particular requirements on competing providers of a given service, or should ensure only that the *overall* regulatory burdens imposed on such competitors are roughly equal. *NOI* ¶ 45. If the Commission means to suggest by this question that neutrality is achieved by measuring whether "overall regulatory burdens" are as onerous for cable companies as they are for telecommunications companies, then competitive neutrality would not only require adoption of an open access regime, but would require that cable company rates for video programming be *more* strictly regulated. Alternatively, it would mean that telecommunications providers should become *less* regulated in order to match the level of burden imposed on cable operators. Neither approach makes any sense.

If, on the other hand, the Commission is simply stating that competitive neutrality can be achieved if the same overarching principles of non-discriminatory access are applied both to telecommunications providers that own telephone wires and cable companies offering telecommunication services over their facilities, that approach may well make sense. The statute simply defines telecommunications providers by the type of service they provide, "regardless of the facilities used." 47 U.S.C. § 153(46). This does not mean that the Commission would ignore technological differences in the operations of different platforms. It simply means that the same standards of non-discriminatory access at reasonable prices and under reasonable terms apply to all telecommunication services, irrespective of the facilities used to provide them.

This Commission has noted that, in the universal service context, the principle of competitive neutrality should include technical neutrality; competitive neutrality in this context means that support mechanisms and rules "should neither unfairly advantage nor disadvantage one provider over another, and neither unfairly favor or disfavor one technology over another."

Joint Board Recommended Decision, 12 FCC Rcd at 101 (1996). As the Federal Energy Regulatory Commission has held in connection with analogous regulation of transmission access, a "national patchwork of open and closed transmission systems, with disparate terms and conditions of service" is undesirable. *Order No.* 888, *FERC Stats. & Regs.*, ¶ 31,036 at 31,673 (1996). As a matter of common sense, one would anticipate that application of the technological neutrality principle would mandate cable open access since the technological equivalent of cable access is DSL. Because DSL is subject to open access, cable should be too. Indeed, in rural areas like much of Vermont, where DSL is not available, denying open access to Internet service providers will not only undermine technological neutrality, it will exacerbate what the Administration has characterized as an already-troublesome "digital divide" between poorer and rural America and the more affluent in some of its larger urban centers.[55]

It is certainly true that "competitive neutrality" could be preserved as between cable and local exchange carriers if the Commission were to forbear from regulating access in *both* industries, but the cost to competition would be catastrophic. Just last year, when the cable open access debate was already raging, the Commission adopted collocation rules "to address charges that many incumbent LECs were improperly delaying, making more expensive, or precluding entirely the competitive local exchange carriers' (competitive LECs') physical collocation efforts." *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, First Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 4761 (1999) (Advanced Services Report and Order), *aff'd, in part and remanded in part sub nom. GTE Service Corp. v FCC*, 205 F.3d 416 (D.C. Cir. 2000). The principal victims

---

[55] *See*, "Falling Through the Net: Defining the Digital Divide (Report), http://www.ntia.doc.gov/ntiahome/digitaldivide (July 8, 1999). Race and income disparities that affect access to